

was on the fact that alternative routes appeared to be more expensive, and thus would impose a competitive disadvantage on those forced to use those routes.²⁵

Undergrounding requirements on new entrants have the same effect as the unlawful regulations struck down in the *Minnesota* decision. On average, underground construction costs three to six times more than aerial construction, and takes considerably longer to complete. The reasons for that substantial disparity are quite obvious. To construct underground requires street cuts, digging, trench reinforcement, conduits (possibly encased in concrete), manholes, hand holes, and vaults, among other things. Aerial construction, by comparison, requires a smaller crew and only a bucket truck, strand, and a lashing machine. Aerial construction is substantially faster, and is less subject to weather delays (particularly in northern areas where ice and snow play a role). Aerial construction also has substantial advantages over underground construction in the long term, as maintenance of aerial attachments is less expensive and easier, and upgrades are also more easily accomplished.

For those reasons, requiring new entrants to construct underground while the ILEC is allowed to maintain, and in some cases upgrade, its facilities aerially, has the effect of prohibiting competitive entry. It imposes greater burdens, in terms of cost and time, and has the potential to prevent certain carriers from providing facilities-based service.

B. Allowing An ILEC To Remain Aerial Is Not Competitively Neutral Or Nondiscriminatory

Undergrounding requirements, such as those identified by City Signal, that apply only to new entrants are not competitively neutral and nondiscriminatory, as required by Section 253(c). Section 253(c) of the Communications Act explicitly provides that, to the extent a municipality has the limited authority to manage the physical occupation of the public rights-of-way by

²⁵ See, e.g., *id.* at ¶ 28-29.

telecommunications providers, it must do so on a “competitively neutral and nondiscriminatory basis.” 47 U.S.C. § 253(c). The Commission has repeatedly found that regulations imposing burdens only on new entrants violate the competitive neutrality requirements of Section 253(c).

In one of the first cases addressing Section 253(c), the Commission addressed local regulatory regimes that give a free pass to the ILEC, while demanding substantial and burdensome requirements from new entrants. The Commission found such discrimination “especially troubling,” and noted:

One clear message from section 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and nondiscriminatory basis. *Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.*

TCI Cablevision, 12 FCC Rcd. at 21443, ¶ 108 (emphasis added).

In *Silver Star Telephone Co., Inc.*, the Commission again addressed a state law that favored ILECs and burdened new entrants, and held that “disparity in the treatment of *classes of providers* violates the requirement of competitive neutrality [of Section 253(c)].”²⁶ On appeal of the Commission’s *Silver Star* decision, the Tenth Circuit provided a detailed analysis of the “competitive neutrality” requirement.²⁷ For example, the court noted that the Commission had previously addressed a competitive neutrality requirement in the context of Section 251 of the 1996 Act, and that “the FCC has ruled that a mechanism assigning costs based on each exchange carrier’s active local numbers is ‘competitively neutral’ [under § 251(e)(2)] **but a mechanism**

²⁶ 12 FCC Rcd. 15,639, 15658 (1997), *recon. denied*, 13 FCC Rcd. 16,356 (1998) (emphasis added).

²⁷ *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

requiring new entrants to bear all the costs of number portability is not.”²⁸ The court thus affirmed the Commission’s *Silver Star* decision, rejecting the state’s argument that the regulation was “competitively neutral” because it treated all *new* entrants the same.²⁹

In *AVR, L.P. d/b/a Hyperion of Tennessee, L.P.*, the Commission held that a Tennessee statute that protected ILECs serving fewer than 100,000 customers from competition violated Section 253(a).³⁰ The Commission found that the provision did not fall within the State’s authority under Section 253(b) because it was not competitively neutral, rejecting the State’s argument that the competitive neutrality requirement only required it to treat new entrants neutrally, but not ILECs.³¹

In *Public Utility Commission of Texas*, the Commission ruled on a petition for declaratory ruling requesting a determination as to whether certain provisions of the Texas Public Utility Regulatory Act of 1995 (PURA) violate the 1996 Act and are subject to preemption.³² Three of the most important provisions of PURA at issue were: (1) the Certificates of Operating Authority (“COA”) (certificate for “basic local telecommunications service” as defined by PURA § 3.002(1)) build-out requirement; (2) the Service Provider Certificate of Operating Authority (“SPCOA”) (certificate for switched access services which use local exchange facilities for the origin and termination of inter- and intrastate toll calls) eligibility limitation; and (3) the discount available to SPCOA resellers of local exchange service of an ILEC.

²⁸ *Id.* at 1269 (quoting *US West v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999))(emphasis added).

²⁹ *Id.*

³⁰ 14 FCC Rcd. 110664 (1999).

³¹ *Id.* at ¶ 16.

³² 13 FCC Rcd. 3460 (1997).

The Commission preempted enforcement of the requirement that COA holders serve a specified portion of their service area using facilities that do not belong to the ILEC, holding that these provisions “restrict the means or facilities through which a party is permitted to provide service in violation of section 253” and they “impose a financial burden that has the effect of prohibiting certain entities from providing telecommunications services in violation of section 253.”³³

Applying the Commission’s overwhelming precedent on this issue to regulations that require new entrants to construct underground while allowing ILECs to remain aerial leads to the unavoidable conclusion that such regulations are not competitively neutral or nondiscriminatory. As discussed above, the burdens of constructing and maintaining facilities underground are substantially greater than constructing and maintaining facilities aerially. In addition, allowing an ILEC to continue maintaining and upgrading its aerial facilities while the new entrant is prohibited from commencing aerial installation is competitively biased and a discriminatory barrier to entry in violation of Section 253.³⁴

³³ *Id.* at ¶ 13.

³⁴ In its opposition to City Signal’s petition, the City of Cleveland Heights asserts that the ILECs facilities “have been on poles in the City for more than twenty years.” Opposition at 2. The City apparently believes that because they have been there a long time, it is acceptable to exempt the ILEC’s facilities from the regulations imposed on its competitors. But the City’s position is flawed in several ways. First, it is extremely unlikely that the ILEC has not installed any new facilities in the past twenty years. Indeed, with the massive roll out of DSL and similar services, ILECs are installing new facilities, replacing old facilities, or adding to existing facilities all over the country. *See Dina El Boghdady, For Fiber Optics, Capital Keeps Coming*, WASH. POST, Jan. 11, 2001 at E5. It is highly unlikely that the ILEC in Cleveland Heights is any different. Second, even if the ILEC had not touched its facilities in over twenty years, for the reasons discussed above, it would still be discriminatory for the City to deny new entrants the same aerial construction option that the ILEC was afforded. Instead, the City should treat the incumbent and new entrants in a comparable manner. New entrants should be allowed to construct aerially until, and if, the City decides that *all* providers should relocate underground.

C. Claims That New Construction Creates “Visual Blight” Are Not Competitively Neutral Or Nondiscriminatory

The City of Cleveland Heights asserts in its opposition to City Signal’s petition that the delay and its undergrounding policies are the product of the City’s concern about “visual blight.”³⁵ Such concerns, however, do not justify a city’s delay of a CLEC’s entry into a market and are not valid exercises of a city’s right-of-way management authority.

First, as demonstrated above, a policy that permits an ILEC to construct and maintain its facilities aerially but requires new entrants to construct underground is a barrier to entry, and is discriminatory and not competitively neutral.

Second, and critically, this type of “policy” is highly subjective and imbues the city with unfettered discretion in violation of Section 253(a).³⁶ Indeed, the arbitrary and capricious application of the policy shines through in its application. The City of Cleveland Heights asserts that existing poles have attachments by the ILEC and the cable operator. Presumably, the poles also have the attachments of the electric power utility (typically multiple wires). So there are already poles, containing three or more sets of wires. The City has not determined that those poles and attachments constitute a “visual blight,” but apparently feels that the addition of one more wire by a CLEC would. Perhaps another city would determine that the first CLEC could attach to the poles, but that the second or perhaps the third CLEC’s wire would create “visual blight.” It is a standardless and subjective policy that allows the City unfettered discretion – and it is for that very reason that the City now seeks to employ the “visual blight” defense.³⁷ If

³⁵ Opposition at 2-3.

³⁶ *PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409, *20 (E.D. Pa. 1999).

³⁷ The City’s request for a hearing is similarly disingenuous. Indeed, it is yet a further example of the City’s willingness to use delay to coerce the CLEC into accepting an unlawful regulatory scheme.

Cleveland Heights were truly concerned with the issue, and with attracting business to its downtown areas, it would encourage the deployment of competitive telecommunications networks and would administer an undergrounding requirement only in a competitively neutral manner that applied evenly to *all* present and future owners of telecommunications and utility facilities.

The Commission should have no problem rejecting this argument. In its dish/antenna siting rules, the Commission has already established that Congress did not intend to allow subjective, aesthetic assertions to support barriers to deployment of competitive facilities.³⁸ The same rules should apply here. Cities may not allow one provider to construct aurally, but claim that all new entrants must construct underground because of visual blight. If one must go underground, then all must go underground at the same time. There is simply no rational support for a “policy” that permits the ILEC to stay above ground, but holds that all others would constitute a visual blight.

The Commission should also look to Section 224 of the Communications Act, as amended.³⁹ The Commission has interpreted Section 224(f)(1) as requiring pole owners to upgrade their poles to accommodate new attachments.⁴⁰ This provision demonstrates a clear congressional belief that pole congestion is not a legitimate reason to prohibit competition. No municipality may adopt a regulation or policy that conflicts with the expressed will of Congress,

³⁸ See *Preemption of Local Zoning Regulation of Satellite Earth Stations*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 19276 (1996).

³⁹ 47 U.S.C. § 224.

⁴⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 1161-1163 (1996) (combining the right of a utility to replace a pole for its own benefit with the principle of non-discriminatory access in Sec. 224(f) to require utilities to do the same for cable and telecommunications providers).

or that thwarts the attainment of the stated congressional policy.⁴¹ Yet, that is precisely what the City of Cleveland Heights' visual blight argument seeks to do (*i.e.*, say to the pole owner, "Section 224(f) requires you to add new attachments, but we say you can't"). The City's position creates an absolute conflict between the pole owner's obligation under Section 224 and the City's policy. Accordingly, the City's policy is preempted and unenforceable.⁴²

IV. CONCLUSION

The issues raised in the City Signal petitions are timely and critical to the development of facilities-based competition throughout the country. As demonstrated above, Congress clearly intended to prohibit unreasonable delays and discriminatory construction policies, like those faced by City Signal (and by ABS elsewhere). For the reasons discussed above, the Commission should promptly grant City Signal's petitions and declare that such delay and discrimination are unlawful.

⁴¹ *TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, 21399 ¶ 7 (1997).

⁴² Such policies, if permitted to stand, could be easily abused by ILECs at the local level. An ILEC could use its substantial influence and power to bring about the adoption of such a policy, which would thus excuse it from the specific obligations of Section 224(f).

Respectfully Submitted,



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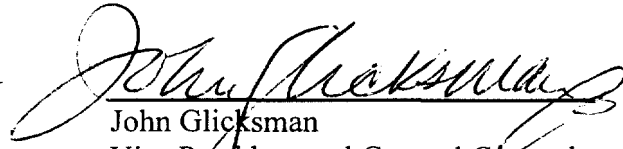
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CERTIFICATE OF SERVICE

I, Rudi CHEVANNES, hereby certify that I have this 31st day of January, 2001, caused a copy of the foregoing Comments of Adelphia Business Solutions, Inc., to be delivered by courier to the following:

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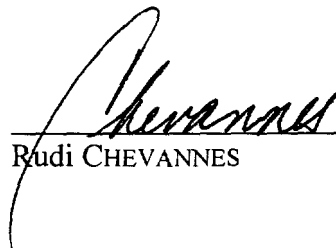
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